UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Oakland, CA)

SERVICE CRAFT LLC

Employer[1]

and Case 32-RC-4809

CANNERY, WAREHOUSEMEN,
FOOD PROCESSORS, DRIVERS, AND
HELPERS UNION, LOCAL 748, affiliated
with INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

Petitioner[2]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding[3], the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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1 The name of the Employer appears as amended at the hearing.

2 The name of the Petitioner appears as amended at the hearing.

3 Briefs filed by the parties have been carefully considered.

2. The parties stipulated, and I find, that the Employer is a California corporation with facilities located in Modesto, California, where it is engaged in the storage and shipping of goods. During the past 12 months, the Employer has provided services valued in excess of $50,000 directly to customers located outside the State of California. In such circumstances, I find the assertion of jurisdiction herein appropriate.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Petitioner seeks to represent all full-time and regular part-time warehouse employees, including warehouse clerical employees, leadpersons, cycle counters, and building maintenance employees employed at the Employer's Modesto, California facilities; excluding all managerial and administrative employees, salespersons, office clerical employees, quality assurance employees, warehouse supervisors, and employees currently provided to the Employer by temporary service or employment agencies and all other employees, guards, and supervisors as defined by the Act.[4] Contrary to Petitioner, the Employer contends that the unit should include employees currently provided to it by temporary service or employment service agencies, but argues that it, and the temporary agencies, have not consented to a unit that combines in one unit employees who are jointly employed by a supplier employer, (the temporary agencies), and a user employer, (the Employer), with employees solely employed by

[4] The petitioned-for unit appears as amended by Petitioner at hearing.

the user employer. The Employer also argues that the supplier employers were not named in the petition, and were not given sufficient notice or due process.[5]

The Employer, with headquarters in Buena Park, California, operates various warehouses throughout the State of California, including 4 warehouse facilities in Modesto, California. Three of the Modesto facilities are located on Finch Street and the other is located within a half-mile on Mariposa Street. Roger Peters, the General Manager of the Northern California Warehouse Division, is the highest-ranking official for the Modesto facilities. Peters' office is located in one of the four Modesto facilities in what is referred to as the Clorox building, where a majority of the product received comes from Clorox Corporation. Operations Manager Mike Howells reports to Peters, and Warehouse Managers Greg Baylor and Tom Gillum report to Howells. Directly under the Warehouse Managers are the Warehouse Supervisors.[6] The Employer employs approximately 80 employees at its Modesto warehouses.

The Employer employs about 35 of it's own employees and also uses 40 to 45 "temporary" employees who are supplied to it by 5 different employment agencies: Sharp Staffing, Staff Mark, J.M.J, Solutions, Inc., Valley Staffing, and Remedy Temporary Services. The Employer utilizes two types of "temporary" employees: "temporary-to-hire" employees who are intended to become permanent employees of the Employer; and, short-term project employees that are used by the Employer for short-term projects. J.M.J. and Staff Mark are the Employer's two largest suppliers of temp-to-hire employees. Currently, the Employer has between 35 to 40 temp-to-hires and about 6 project employees.

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[5] J.M.J. Solutions, Inc., (one of the supplier employers), submitted a brief regarding this issue that is addressed *infra.*

[6] The parties stipulated, and I find, that the general manager, the operations manager, warehouse managers, and the warehouse supervisors, including Frank Gordon, Larry Cole, Tony Silva, and Jim Kummer, are statutory supervisors within the meaning of Section 2(11) of the Act.

Temp-to-hire employees constitute approximately 90 percent of the Employer's new hires. The Employer has a standing order with the agencies to supply labor and the Employer has the discretion to increase or decrease the number of temporary applicants supplied. The Employer sets the temporary employees' wage rate, and the agencies charge the Employer a mark-up of about 13 to 15 percent. The intention is for all temp-to-hire employees to become the Employer's employees after a 90-day probationary period and the Employer notifies temp-to-hire employees of this fact during their interview. The Employer is not charged a fee or penalty for hiring temp-to-hire employees. During the 90-day probationary period, the agencies issue payroll checks, make all statutory deductions for state and federal income taxes, and remit contributions for workers' compensation coverage.

During the first five years of its operation, the Employer did not use employment agencies as a means to hire permanent employees. Over the past two years the Employer began using agencies as a tool for hiring permanent employees in order to meet a growing trend in its business. Presently, the Employer hires only about 10 percent of its workforce from outside by listing job openings on the Internet and advertising in newspapers. If an employee learns of a job opening through one of these mediums, the Employer hires them as a permanent employee without going through one of the employment agencies. The Employer's goal is to revert to hiring new employees without the use of agencies once it has a steady volume, and a dependable and qualified workforce.

When the agencies have prospective applicants, they call the Employer to set up an interview. After the Employer interviews the applicant, the temp-to-hire employees must pass a drug test administered by the agencies. Thereafter, the Employer provides on-site training for

the temp-to-hire employees before they commence work that consists of a 3 to 4-hour seminar and testing, and training on the use of hand-held computers and forklift equipment. Next, the Employer provides the temp-to-hire employees with on-the-job training whereby they work alongside Service Craft employees. The Employer prefers to hire temporary employees with experience but has hired employees without experience. During the 90-day probationary period, and once the temp-to-hire employees are familiar with order picking, they can ask to move on to other duties such as loading trucks, receiving product, or operating different equipment.

At the end of 90 days, temp-to-hire employees are eligible to become permanent employees and must go through a pre-employment physical administered by the Employer, including a drug test. Over the past two years, approximately 70 to 80 percent of the temp-to-hire employees have opted to become permanent employees. In some cases, the Employer exercises its option not to retain a temp-to-hire employee as a permanent employee based on the employees' performance. The Employer keeps a performance record of all the temp-to-hire employees which includes a record of their productivity, shipping errors, tardiness, absenteeism, ability to work with others, and safety. Once the temp-to-hire employee becomes a permanent employee, the Employer takes over the payroll for that employee.

During the 90-day probationary period, temp-to-hire employees earn $8 an hour. When they become permanent employees of the Employer, they receive a raise to $8.50 per hour. After another 90-day probationary period through the Employer, and a review based upon their performance, the employee receives another $.50 to $1.00 per hour raise. Permanent employees receive raises in the range of 4 to 6 percent per year based on an annual merit review. The highest-paid non-lead permanent employee earns $13.25 per hour. The highest-paid lead person earns $13.88 per hour. Permanent employees also receive medical, dental, and vision benefits, a

401K plan, a profit-sharing plan, and paid holidays after 90 days. Vacations are based upon years of service. Temp-to-hire employees do not receive any of these benefits from the Employer during their 90-day probationary period, and it is up to the agencies whether or not to provide such benefits. Once temp-to-hire employees become permanent, they too are eligible for the same benefits enjoyed by permanent employees.

The temp-to-hire employees work side-by-side with permanent employees, and use the same equipment, such as forklifts and hand-held computers. Permanent hourly employees, and temp-to-hire employees work the same hours, and work and are paid overtime. If a temp-to-hire employee is going to be absent, they contact the agency and the agency contacts the Employer but does not send a replacement to cover for the absence. The temporary agencies do not provide on-site managers or supervisors, and agency representatives do not go to the Employer's facility to monitor the temporary employees' work. Rather, permanent employees and temp-to-hire employees are subject to the same Employer supervision. Likewise, the Employer's warehouse supervisors determine the hours, lunch, and break times of both the permanent and temp-to-hire employees.

The only issue presented is whether the temp-to-hire employees share a community of interest with the Employers permanent employees in the petitioned-for unit such that they must be included in the unit.[7] The inclusion of so-called "temporary" employees is based on community of interest factors. M.B. Sturgis, 331 NLRB No. 173 (2000). In arriving at an appropriate unit determination, the Board weighs various community of interest factors, including:

[7] In their briefs, the Petitioner and Employer agree, and I find, that the temporary project employees, do not share a community of interest with the unit herein found appropriate and, therefore, they shall be excluded.

> [A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs. . .; the infrequency or lack of contact with other employees; lack of integration with other employees; lack of integration with work functions of other employees or interchange with them; and the history of bargaining.

Overnite Transportation Company, 322 NLRB 723, 724 (1996), citing Kalamazoo Paper Box Corporation, 136 NLRB 134, 137 (1962). No one of the above factors has controlling weight and there are no *per se* rules to include or exclude any classification of employees in any unit. Airco, Inc., 273 NLRB 348 (1984). Furthermore, the test for determining the eligibility of individuals designated as "temporary" employees is whether they have an uncertain tenure, and under Board precedent, an employee is not considered to be a "temporary" employee unless a definite termination was established at the time of their hire. See Quality Chemical, Inc., 324 NLRB 328 (1997); and U.S. Aluminum Corp., 305 NLRB 719 (1991).

While temp-to-hire employees do not receive the same rate of pay or benefits as the Employers permanent employees, they work alongside the permanent employees performing the same type of work during the same hours, are subject to the same rules, and are supervised by the same supervisors. In addition, although temp-to-hire employees are classified as "temporary" employees, this label is essentially a misnomer. The Employer uses the employment agencies as a recruiting mechanism to meet the growth in its business over the last two years, and it intends to phase-out the use of such agencies once it has a qualified and dependable workforce. Thus, the temp-to-hire employees are essentially newly hired warehouse employees undergoing a probationary training and orientation period. The temp-to-hire employees are interviewed and hired by the Employer with the announced expectation that,

provided their job performance is acceptable, they will be converted to regular full-time employees at the end of their 90-day probationary period. During this period, the Employer provides training, and completes assessments of their performance and progress. In fact, 70 to 80 percent of all temp-to-hires have been converted to permanent status after their 90-day probationary period. Once the temp-to-hire employees are converted to permanent status, they receive the full complement of benefits that all other employees of the Employer receive. Thus, I find that the temp-to-hire employees share a substantial community of interest with the petitioned-for employees of the Employer, and that they shall not be excluded as temporary employees since there is no definite termination established at the time of their hire with the Employer.

Contrary to the Employer's contention, there is no consent requirement for units that combine jointly employed and solely employed employees of a single user employer. See M.B. Sturgis, supra.. Moreover, I find it unnecessary to reach the due process arguments raised by the Employer and J.M.J. Where the Petitioner seeks to represent a bargaining unit consisting only of the employees of a single user employer, the Board does not require the naming of all potential joint employers and the litigation of their potential relationship with the user employer. Professional Facilities Management, Inc., 332 NLRB No. 40 (2000). As was the case in Professional Facilities, the Petitioner here has named only the Employer in its petition, and has not sought to amend its petition to name any of the supplier employers. In these circumstances, there is no need to reach the issue of whether the supplier employers (Sharp Staffing, Staff Mark, J.M.J. Solutions, Inc., Valley Staffing, or Remedy Temporary Services) are joint employers of the unit employees. Id. It follows that the issue raised by the Employer and J.M.J. concerning

whether J.M.J. or others were denied notice and a reasonable opportunity to be heard is no longer relevant. Thus, I find it unnecessary to rule on the joint employer and due process issues.

In summary, and based on the foregoing, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time warehouse employees, including warehouse clerical employees, leadpersons, cycle counters, recoup employees[8], temp-to-hires, and building maintenance employees[9] employed at the Employer's Modesto, California facilities; excluding all managerial and administrative employees, salespersons, office clerical employees, quality assurance employees[10], temporary project employees, warehouse supervisors, and all other employees, guards, and supervisors as defined by the Act.

There are approximately 75 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election[11] to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the

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[8] Although neither party has stated its position on the inclusion of the recoup employees in the unit, the record revealed, and I find, that the recoup employees share a community of interest sufficient to include them in the petitioned-for-unit.

[9] The parties stipulated, and I find, that cycle counters, warehouse clericals, warehouse team leaders (including Mike Valponi, Scott Robinson, Brendan Barker, Gary Long, Michael Graven, Donnie Stephens, Ray Moore, Terry Dial, Tony Huckins, and Robert Kissee) and building maintenance employees, share a community of interest with the warehouse employees and, thus, they shall be included in the unit.

[10] The parties stipulated, and I find, that the quality assurance employees lack a community of interest sufficient to require their inclusion the unit.

[11] Please read the attached notice requiring that the election notices be posted at least three (3) days prior to the election.

Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by CANNERY, WAREHOUSEMEN, FOOD PROCESSORS, DRIVERS, AND HELPERS UNION, LOCAL 748, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

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LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359, 361, fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, 1301 Clay Street, Suite 300 N, Oakland, California 94612-5211, on or before November 7, 2000. No extension of time to file this list shall be granted except in extraordinary

circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by November 14, 2000.

DATED AT Oakland, California, this 31st day of October 2000.

/s/ James S. Scott

James S. Scott
Regional Director
Region 32

32-1205

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